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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEIL HARTIGAN ~~TYRONE C. FAHNER~~, ATTORNEY GENERAL OF ILLINOIS, CHARLES P. ZALAR, STATE'S ATTORNEY OF GRUNDY COUNTY, and PHILIP GUSTAFSON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF NUCLEAR SAFETY,

Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

Appendix 6—Memorandum Opinion and Order of the United States District Court, Northern District of Illinois in *General Electric Co., et al. v. Tyrone C. Fahner, et al.*, No. 80 C 6835, filed October 12, 1981 ..... Supp. App. 1

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY, *Plaintiffs,* v. TYRONE C. FAHNER, Attorney General of the State of Illinois, CHARLES R. ZALER, State's Attorney for Grundy County, Illinois, and PHILIP GUSTAFSON, Director of the Illinois Department of Nuclear Safety, *Defendants.*	No. 80 C 6835
PEOPLE OF THE STATE OF ILLINOIS, ex rel. TYRONE C. FAHNER, Attorney General of the State of Illinois, *Plaintiffs,* v. GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY, *Defendants.*	No. 81 C 461

MEMORANDUM OPINION AND ORDER

These cases involve challenges to the constitutionality and enforcement of a provision of the Illinois Spent Fuel Act, Ill.Rev. Stat. ch. 111½, § 230-22 (Supp. 1981). This provision provides that:

> No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this State, or transport into this State for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this State, unless the state of origin of such spent nuclear

> fuel has a facility, which is not part of a power generating facility, for the disposal or storage of spent nuclear fuel substantially like that of this State and has entered into a reciprocity agreement with this State. The determination as to whether the state of origin has a disposal or storage facility for spent nuclear fuel substantially like that of this State is to be made by the Director of the Department of Nuclear Safety and all reciprocity agreements must be approved by a majority of the members of both Houses of the General Assembly and approved and signed by the Governor.

General Electric Company ("GE") and Southern California Edison ("SCE") are plaintiffs in case number 80 C 6835 and defendants in case number 81 C 461. They are opposed in each instance by Illinois Attorney General Tyrone Fahner. Additionally, the State of Illinois is a plaintiff in 80 C 461, while Charles R. Zaler, State's Attorney for Grundy County, and Philip Gustafson, Director of the Illinois Department of Nuclear Safety (collectively referred to as the "State"), are named as defendants in 80 C 6835.

GE operates a storage facility for spent nuclear fuel in Morris, Grundy County, Illinois. SCE ships spent nuclear fuel from its San Onofre, California nuclear plant to Morris for storage. GE and SCE challenge the constitutionality of the Spent Fuel Act as violative of the Supremacy Clause and the Commerce Clause of the Constitution. The cases are currently before the court on the motion of GE and SCE for summary judgment in case number 80 C 6835 and for declaratory relief in case number 81 C 461.

I.

GE and SCE[1] base their contention that the Spent Fuel Act is unconstitutional under the Supremacy Clause on the grounds, *inter alia*, that state regulation of the transportation and storage of spent nuclear fuel has been preempted by a federal statutory and regulatory scheme.

The doctrine of federal preemption originates in Article VI of the Constitution, the Supremacy Clause, which provides that:

> This Constitution, and the Laws of the United States shall be made in Pursuance thereof . . . shall be the the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When a state's right to exercise its authority is challenged under the Supremacy Clause, a federal court must commence its analysis, with the position that "the historic powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). The court must then determine whether Congress either explicitly or implicitly prohibited the states from regulating the matters at issue. *See Pacific Legal Foundation v. State Energy Resources Conserv. & Develop. Comm'n*, 472 F.Supp. 191 (S.D. Cal. 1979).

Express preemption occurs when Congress has expressly provided that a federal regulation is intended to be exclusive, either in a federal statute or in the legislative history regarding that statute. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). Implied preemption can occur in several ways, including situations where a scheme of pervasive federal regu-

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[1] GE and SCE are joined in their motions by the United States as *amicus curiae*. The State of Illinois is joined by the Citizens for a Better Environment as *amicus curiae* in opposition to the motions for summary judgment and declaratory relief.

lation exists supporting a reasonable inference that Congress did not intend for the states to supplement the regulatory scheme or where an Act of Congress deals with an area of dominant federal interest so that it is reasonable to assume that state regulation of the same area is precluded. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In an earlier opinion, *General Electric Co. v. Fahner*, No. 80 C 6835 (N.D. Ill. May 22, 1981), this court rejected the State of Illinois' argument that the Spent Fuel Act is not preempted by federal law. In both instances, the state referred to the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, amending the Clean Air Act, 42 U.S.C. §§7401-642 (Supp. 1980), and accompanying legislative history, *see, e.g.*, House Conf. Rep. No. 95-564 (Aug. 3, 1977), 1977 U.S. Code Cong. & Ad. News 1523, as support for its position. While these provisions deal with state authority to regulate radioactive air pollutants, they are, in the wider scheme, but exceptions to the comprehensive federal plan for the regulation of nuclear fuel as originally set forth in the Atomic Energy Act of 1954, as amended. *See, e.g., Pacific Legal Foundation v. Energy Resources Conserv. & Develop. Comm'n*, 472 F.Supp. 191, 198 n. 5 (S.D. Cal. 1979). The passage of the Clean Air Act Amendments of 1977 does not give rise to an inference that Congress intended for the states to supplement existing laws governing the storage and transportation of spent nuclear fuel.

The Atomic Energy Act created a pervasive regulatory scheme with exclusive authority vested in the Atomic Energy Commission ("AEC").[2] *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd. mem.*, 405 U. S. 1035 (1972). Congress intended the mandate to the NRC to include the authority to license and otherwise regulate the use,

[2] The AEC was subsequently abolished by the Energy Reorganization Act of 1974. The AEC's licensing and related regulatory functions were transferred to the Nuclear Regulatory Commission ("NRC"). 42 U.S.C. § 5841(f)(1976).

possession and transfer of radioactive material. This grant of authority extends, by clear implication, to spent nuclear fuel as well.[3]

Procedures exist, however, for the "discontinuance" by the NRC and the "assumption" by the states of certain regulatory responsibilities that are otherwise exclusively vested with the NRC. Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021. This occurs only after the state has entered into a "section 274 Agreement" with the NRC. The State of Illinois has not entered into such an agreement.

While a Section 274 Agreement would allow for a partial divestment of authority and control from the NRC, the states are also expressly prohibited from assuming control over specific aspects of the nuclear regulatory scheme. Thus, even if Illinois had entered into a Section 274 Agreement, it could not regulate production and utilization facilities. 42 U. S. C. § 2021(c). In conjunction with the retention of these areas of authority, the NRC promulgated regulations that expressly preserve exclusive licensing and regulatory authority over the "transfer, storage or disposal of radioactive waste material resulting from the separation in a production facility of special nuclear material from irradiated reactor fuel." 10 C.F.R. § 150.15(a)(4) (1980).

Moreover, several courts, beginning with *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd. mem.*, 405 U.S. 1035 (1972) have held that state regulation of nuclear waste is preempted by federal law. *See generally Train v. Colorado Pub. Int. Research Group, Inc.*, 426 U.S. 1, 14-18

[3] The NRC's authority is based on the fact that spent nuclear fuel constitutes "byproduct material," which is, in turn, defined as "radioactive material . . . yielded in . . the process of . . . utilizing special nuclear material." 42 U.S.C. § 2014(e). The ownership, custody, handling and disposal of byproduct material is regulated by the NRC pursuant to 42 U. S. C. §§ 2111-114 and regulations promulgated thereunder.

(1976); *Washington Building & Construction Trades Council v. Spellman*, No. L-81-154 (E.D. Wash. June 26, 1981) slip op. at 5-7; *State of Illinois v. Kerr-McGee*, No. 80 C 2776 (N.D. Ill. Jan. 8, 1981).

For the aforementioned reasons, this court holds that the Illinois Spent Fuel Act, inasmuch as it seeks to restrict the shipping and storage of spent nuclear fuel brought into Illinois, asserts state jurisdiction over an area of regulation preempted by an exclusive federal regulatory scheme. The Spent Fuel Act, therefore, is unconstitutional as violative of the Supremacy Clause.

II.

Next, GE and SCE contend that the Spent Fuel Act imposes an impermissible burden on interstate commerce in violation of the Commerce Clause, Article I, section 8 of the Constitution. The state asserts, on the other hand, that the Act comes within the quarantine exception to the Commerce Clause and, thus, is not unconstitutional.

The Commerce Clause provides, in part, that "Congress shall have Power . . . To Regulate Commerce . . . among the several States . . . ." This has been interpreted as reflecting "a central concern of the Framers . . . that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

At the outset, there is no question but that the movement of nuclear waste in interstate commerce fits within the definition of "commerce" for constitutional purposes. *Washington Building & Construction Trades Council v. Spellman*, No. C 81 190, (E.D. Wash. June 26, 1981) slip op. at 8. *See Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). Many areas of potential

federal regulation have escaped congressional attention by virtue of their local character. *Id.* at 623, *citing South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938). A statute is *not* in violation of the Commerce Clause as long as it serves a legitimate state interest and it is applied in a nondiscriminatory manner. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In those situations, however, the court must make a "delicate adjustment" of the conflicting state and federal claims." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976), *quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 553 (1949), (Black, J. dissenting).

The criteria for making this determination are set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *Pike* focuses, generally, on three areas: 1) whether the state law regulates evenhandedly; 2) whether it effectuates a legitimate local public interest; and 3) whether it has a minimal effect on interstate commerce. *Pike, supra* at 142.

Applying the *Pike* test, the court finds that the Spent Fuel Act regulates, not evenhandedly but discriminatorily, in its effect on interstate commerce. The Act prohibits the importation of spent nuclear fuel for disposal or storage in any off-site nuclear storage facility in Illinois unless a similar facility and reciprocal agreement exists with the state of origin. The Act is *per se* discriminatory. The Illinois legislature was aware of the fact that the Morris plant is the only off-site nuclear storage facility of its kind in the country. *See* Memorandum of General Electric Company and Southern California Edison Company in Support of their Motion for Summary Judgment at 26 n.* and **. Reciprocity, therefore, is impossible and, as such, the Act totally bans the importation for storage on the storage of spent nuclear fuel from outside of Illinois. *See generally Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Where, as is the case here, a state "overtly blocks the flow of

interstate commerce at state's borders," *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978), the court need not proceed further under the *Pike* test as the statute is clearly in violation of the Commerce Clause. *Kassel v. Consolidated Freightways Corp.*, ____ U.S. ____, 49 U.S.L.W. 4328 (Mar. 24, 1981).

Finally, the court must address the state's assertion that the Spent Fuel Act comes within the ambit of the quarantine exception to the Commerce Clause. This argument is premised on the fact that some state regulations, even though they facially discriminate against interstate commerce, have been upheld because they represent "a legitimate attempt to protect the people of the State." *Sligh v. Kirkwood,* 237 U.S. 52, 59-60 (1915). *See Clason v. Indiana,* 306 U.S. 439 (1939); *Asbell v. Kansas,* 209 U.S. 251 (1908).

The same argument, however, was offered, and rejected, by the Supreme Court in *Philadelphia v. New Jersey,* 437 U.S. 417 (1978). In *Philadelphia,* the Court distinguished the quarantine cases from the case at hand, which involved a New Jersey statute that prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State . . ." *id.* at 621, for the reason that the prohibition did not discriminate against interstate commerce, "but simply prevented traffic in noxious articles whatever their origin." *Id.* at 629.

The Court distinguished further the fact that no claim had been made that the very movement of waste into or through the state endangered health. *Id.* The transportation and storage of nuclear waste, of course, does pose a danger to the health of Illinois residents. But the inherent danger applies *equally* to all people. As the Court found in *Philadelphia,* there is no basis to distinguish between the danger to Illinois residents and that affecting the residents of the other forty-nine states. "If one is inherently harmful, so is the other." *Id.* The Spent Fuel Act, like the New Jersey statute, attempts to block the importation for storage and the storage of spent nuclear fuel in an off-site

facility "is an obvious effort to saddle those outside the State with the entire burden. . . ." *Id.* The Commerce Clause protects against the "efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Id.*

In conclusion, this court holds that the Spent Fuel Act violates both the Supremacy Clause and the Commerce Clause of the Constitution. The statute is void and unenforceable. The motions of GE and SCE for summary judgment in case number 80 C 6835 and for declaratory judgment in case number 81 C 461 are hereby granted. Both cases are dismissed.

ENTER:

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UNITED STATES DISTRICT JUDGE

DATED: October 12, 1981